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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. KRISTOFFER FRANCIS ACEVEDO, Defendant and Appellant.	E048168 (Super.Ct.No. RIF142506) OPINION

APPEAL from the Superior Court of Riverside County. Jeffrey Prevost, Judge. Affirmed with directions.

Allison K. Simkin, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Steve Oetting and Eric A. Swenson, Deputy Attorneys General, for Plaintiff and Respondent.

Pursuant to a plea to the court in exchange for an indicated sentence of a 10-year lid, defendant and appellant Kristoffer Francis Acevedo pled guilty to two counts of felony child abuse (Pen. Code, § 273a, subd. (a))[1] (counts 1 & 2); gross vehicular manslaughter while intoxicated (Pen. Code, § 191.5, subd. (a)) (count 3); driving under the influence of alcohol causing great bodily injury (Veh. Code, § 23153, subd. (a)) (count 4); and driving with a blood-alcohol content of 0.08 percent or higher causing great bodily injury (Veh. Code, § 23153, subd. (b)) (count 5). Defendant also admitted that in the commission of count 1, he had caused the death of a child (Pen. Code, § 12022.95); that in the commission of count 2, he had personally inflicted great bodily injury on a child under the age of five (Pen. Code, §§ 12022.7, subd. (d), 1192.7, subd. (c)(8)); that in the commission of counts 4 and 5, he had proximately caused great bodily injury or death to more than one victim (Veh. Code, § 23558); and that in the commission of counts 4 and 5, he had personally inflicted great bodily injury (Pen. Code, §§ 12022.7, subd. (a), 1192.7, subd. (c)(8)). Following a sentencing hearing, defendant was sentenced to a total term of nine years in state prison.

On appeal, defendant contends (1) the trial court abused its discretion in denying him probation, or at a minimum, sentencing him to the low term rather than the midterm; and (2) the abstract of judgment and the court's minute order of the sentencing hearing

[1] All future statutory references are to the Penal Code unless otherwise stated.

must be amended to correct two clerical errors. We agree that the abstract of judgment and the minute order must be amended. We, however, reject defendant's remaining contentions.

I

FACTUAL BACKGROUND[2]

On June 1, 2007, defendant "was driving . . . northbound on Gillman Spring Road at a speed of over 86 [miles per hour]." As he approached the on-ramp to eastbound Highway 60, he failed to negotiate the right curve, and the vehicle slid out of control and onto the shoulder, rolling over twice. Both defendant and his five-year-old son (K.A.) were ejected from the car, as neither was wearing safety restraints. Defendant's four-month-old son (D.A.) was strapped in his car seat and remained inside the vehicle.

K.A. was killed upon impact due to blunt force trauma to the head. Defendant landed on the center divider of Highway 60, and sustained a fractured hip, two broken ankles, a dislocated left shoulder, and a fractured left eye socket. He spent 22 days in the hospital, one month in a rehabilitation facility recovering from his injuries, and was using a wheelchair at the time of his sentencing hearing. D.A. suffered coronary, pulmonary, and neurological damage, and remained on life support in the intensive care unit for four days. When defendant regained consciousness, he claimed he had no recollection of the incident or the circumstances prior to the incident or the days prior to and after the accident.

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[2] The factual background is taken from the probation officer's report and reports from law enforcement.

A blood sample was taken from defendant about three hours after the accident. At that point in time, defendant's blood-alcohol content was 0.06 percent. Defendant denied that he had been drinking before the accident. He also said that both of his sons were in their safety seats.

K.A.'s mother informed the police that defendant had prior speeding violations. She also stated that when they were still together, defendant would "often drive recklessly as if he was trying to impress someone."

II

DISCUSSION

A. *Denial of Probation*

At the sentencing hearing, the trial court noted that although defendant was presumptively ineligible for probation because he had caused great bodily injury, that unusual circumstances existed pursuant to section 1203, subdivision (e)(3), and California Rules of Court, rule 4.413,[3] and that probation could be granted. Nonetheless, having read and considered the probation officer's report, the parties sentencing memoranda, the statements from defendant and the mothers of his sons, and the arguments of counsel, the trial court declined to grant defendant probation.

[3] All further rule references are to the California Rules of Court unless otherwise indicated.

The trial court discussed its rationale and sentencing as follows:

"In consideration of the factors in support of a grant of probation and factors relating to denial of a grant of probation, I think that the circumstances far outweigh a grant of probation in this matter.

"Defendant, as pointed out by the People, engaged in a pattern of conduct that was increasing in severity with respect to his driving habits. I take note of [d]efendant's prior traffic convictions. I agree that he has not suffered serious offenses relating to driving such as a prior DUI or prior property damage offenses or anything of that type; however, he clearly had a lead foot, and that was demonstrated in this particular incident.

"The factor that I consider most important here in a denial of probation is that, in fact, [d]efendant was in a position of trust which he violated the moment he placed either of these children in that vehicle after having consumed any alcohol at all. I do not understand why persons who choose to drink and drive would ever, ever lose the ability to rationally comprehend that they should not endanger their child by placing them in such a position of danger. And I think that [defendant] threw away the key when he put these children in that car, and there are certain other terms [in] aggravation that I think, particularly with respect to the lack of car seat, that just make it worse. But I do not understand why any parent, particularly [defendant] who has a driving problem, would take any drink and place his children in the vehicle, and then drive away, which obviously resulted in the terrible effects we have here.

"Taking into consideration circumstances supporting a grant of probation and circumstances supporting a denial of probation, I do find that the circumstances . . . in support of a denial of probation, outweigh the [circumstances] in support of a grant with respect to the defendant's ability to comply with the reasonable conditions of probation.

"While the probation officer has had an opportunity to interview and give consideration to that fact, I'm troubled about [defendant]'s complete acceptance of culpability here. I recognize he has accepted responsibility by his plea, but his denial of any circumstances relating to the—his personal causation of this incident cause me to believe that he's not a good candidate for probation.

"With respect to the factors under [rule 4.414(a)] as set forth in page 10, and [rule 4.414(b)] on the same page, I concur with the probation officer's determinations.

"With respect to [d]efendant's remorse, I think he is regretful. As I said earlier, I don't view that quite in the same vein as being remorseful in the sense that there was an immediate apprehension of culpability and acceptance at the time that this occurred.

"With respect to defendant, under subdivision (d)(8), that if [d]efendant is not imprisoned—I recognize that his physical limitations might not cause him to engage in similar conduct, but I'm not convinced that he would not present a danger, given his refusal to accept culpability in this matter on other basis. For that reason, probation is denied in this matter."

The trial court thereafter sentenced defendant to a total term of nine years in state prison as follows: the middle term of four years on count 2 (gross vehicular manslaughter), which was deemed the principal count, plus the middle term of five years for the great bodily injury enhancement attached to that count; the remaining counts and attendant enhancements were either ordered to run concurrent to count 2 or stayed pursuant to section 654.

Defendant contends the trial court abused its discretion in denying him probation.[4] We disagree.

A grant or denial of probation is a matter within the discretion of the trial court. (*People v. Superior Court* (*Dorsey*) (1996) 50 Cal.App.4th 1216, 1225 [Fourth Dist., Div. Two]; *People v. Superior Court* (*Du*) (1992) 5 Cal.App.4th 822, 831 (*Du*).) The trial court's discretion in determining whether to grant probation is broad. (*People v. Stuart* (2007) 156 Cal.App.4th 165, 178-179.) Likewise, the standard for reviewing a trial court's finding that a case is or is not unusual is abuse of discretion. (*Du*, at p. 831.)

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[4] We reject the People's initial argument that the trial court abused its discretion in deeming defendant eligible for probation. The People neither filed a cross-appeal nor objected to this finding in the court below. Accordingly, the People have waived or forfeited this contention. (See, e.g., *People v. Scott* (1994) 9 Cal.4th 331, 353, fn. 15.)

In determining whether or not a case is "unusual," the court applies the criteria set forth in rule 4.413. If the court finds that the case is unusual, it must then decide whether to grant probation, applying the criteria in rule 4.414.[5] (*Du*, at p. 830.)

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[5] Rule 4.414 states: "Criteria affecting the decision to grant or deny probation include facts relating to the crime and facts relating to the defendant.

"(a) . . . [¶] Facts relating to the crime include:

"(1) The nature, seriousness, and circumstances of the crime as compared to other instances of the same crime;

"(2) Whether the defendant was armed with or used a weapon;

"(3) The vulnerability of the victim;

"(4) Whether the defendant inflicted physical or emotional injury;

"(5) The degree of monetary loss to the victim;

"(6) Whether the defendant was an active or a passive participant;

"(7) Whether the crime was committed because of an unusual circumstance, such as great provocation, which is unlikely to recur;

"(8) Whether the manner in which the crime was carried out demonstrated criminal sophistication or professionalism on the part of the defendant; and

"(9) Whether the defendant took advantage of a position of trust or confidence to commit the crime.

"(b) . . . [¶] Facts relating to the defendant include:

"(1) Prior record of criminal conduct, whether as an adult or a juvenile, including the recency and frequency of prior crimes; and whether the prior record indicates a pattern of regular or increasingly serious criminal conduct;

"(2) Prior performance on probation or parole and present probation or parole status;

"(3) Willingness to comply with the terms of probation;

"(4) Ability to comply with reasonable terms of probation as indicated by the defendant's age, education, health, mental faculties, history of alcohol or other substance abuse, family background and ties, employment and military service history, and other relevant factors;

"(5) The likely effect of imprisonment on the defendant and his or her dependents;

"(6) The adverse collateral consequences on the defendant's life resulting from the felony conviction;

"(7) Whether the defendant is remorseful; and

"(8) The likelihood that if not imprisoned the defendant will be a danger to others."

"'"'[T]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.'" [Citations.]" (*People v. Carmony* (2004) 33 Cal.4th 367, 376-377.) "[A] '"decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.'"' [Citations.]" (*Id*. at p. 377.) "[T]hese precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Ibid*.)

Defendant argues his lack of prior record, remorse, acceptance of responsibility for his actions, gainful employment, and lack of posing a risk to public safety support his request for probation. The trial court's sentence, however, will not be set aside merely because it reasonably could have made a different decision. (*People v. Downey* (2000) 82 Cal.App.4th 899, 910.) The trial court, however, did not arbitrarily or irrationally sentence him to nine years in state prison, but followed statutory rules in deciding the sentence. The record clearly shows that defendant's actions involved at least five factors supporting a denial of probation, assuming the trial court erred in finding defendant was not remorseful. These include the seriousness of the crime as compared to other instances of the same crime (rule 4.414(a)(1)); the vulnerability of the victims (4.414(a)(3)); the infliction of physical or emotional injuries (rule 4.414(a)(4)); defendant took advantage of a position of trust or confidence (rule 4.414(a)(9)); and the likelihood

that if defendant is not imprisoned, he will be a danger to others (rule 4.414(b)(8)). Defendant was traveling over 86 miles per hour while intoxicated with his two young sons in the car, one of whom was unrestrained. His actions resulted in the death of his five-year-old son, as well as causing severe (and possibly permanent) injuries to his four-month-old son.

Defendant has made no showing that the trial court's denial of probation was arbitrary or capricious. We conclude the trial court's denial of probation was not an abuse of discretion.

Defendant alternatively contends that the trial court abused its discretion by imposing the middle term, rather than the low term, "where there were several mitigating circumstances to support such a sentence." We again disagree.

Our review of the trial court's determination of the appropriate prison term requires that we apply the same broad discretionary standard as when reviewing the trial court's decision to deny defendant probation. (*United States v. Booker* (2005) 543 U.S. 220, 233 [125 S.Ct. 738, 160 L.Ed.2d 621]; *People v. Carmony*, *supra*, 33 Cal.4th at p. 377.) "One factor alone may warrant imposition of the upper term [citation] and the trial court need not state reasons for minimizing or disregarding circumstances in mitigation [citation]." (*People v. Lamb* (1988) 206 Cal.App.3d 397, 401; see also *People v. Black* (2007) 41 Cal.4th 799, 813.)

Initially, we note the court need not state reasons for its decision when it imposes the middle term of imprisonment. (*People v. Lamb*, *supra*, 206 Cal.App.3d at p. 402.)

Thus, the trial court did not err by failing to state its reasons for imposition of the middle term of imprisonment.

The trial court reviewed the probation report, the sentencing memoranda, victim statements, and character letters in support of defendant. The court also heard statements from defendant and counsel. There is no evidence to suggest that the court applied the wrong factors or failed to give full consideration of the mitigating factors in sentencing defendant to the middle term. The record reflects that the court considered and weighed the competing factors and concluded that defendant's conduct justified the middle term.

We conclude the trial court's rationale to be reasonable; especially in light of the broad discretion afforded to sentencing courts. Defendant's claims to the contrary are without foundation, and he has failed to meet his burden of clearly showing that the trial court's imposition of a middle term was arbitrary or irrational. There was no abuse of discretion.

B. *Correction of Abstract of Judgment and Minute Order*

Defendant next contends, and the People correctly concede, that the clerk's minute order of the February 20, 2009, sentencing hearing and the abstract of judgment must be amended to properly reflect the amount of the restitution and parole revocation fines. Defendant also requests, and the People agree, that this court delete a notation in the February 20, 2009, minute order and the abstract of judgment, which declares that defendant was sentenced pursuant to section 667, subdivision (e)(1). We also agree.

At the sentencing hearing, the trial court imposed a restitution fine of $200.[6] However, the February 20, 2009, minute order and the abstract of judgment indicate defendant is ordered to pay a restitution fine and a parole revocation fine in the amount of $5,000 each.

"'Rendition of judgment is an oral pronouncement.'" (*People v. Mesa* (1975) 14 Cal.3d 466, 471.) Entering the judgment in the minutes is a clerical function, as is the preparation of the abstract of judgment. Therefore, when the oral pronouncement of judgment is in conflict with the minutes and/or the abstract of judgment, the oral pronouncement controls. (*Ibid*.) An appellate court has the authority to order correction of clerical errors on request of either party or on its own motion. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-188.) We will order such correction.

In addition, since defendant had no prior felony convictions, the February 20, 2009, minute order and the abstract of judgment incorrectly note that defendant was sentenced pursuant to section 667, subdivision (e)(1). We will order such correction as well.

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6 We note that the trial court here did not orally impose a parole revocation fine. However, once the trial court imposed the restitution fine under section 1202.4, subdivision (b)(1), the section 1202.45 parole revocation fine was mandatory, and it can be corrected on appeal. (*People v. Smith* (2001) 24 Cal.4th 849, 853 [the imposition of a parole revocation fine pursuant to § 1202.45 (which first requires the imposition of a restitution fine under § 1202.4) is mandatory and may be corrected by an appellate court despite *People v. Tillman* (2000) 22 Cal.4th 300, 303].) We will, therefore, impose the $200 parole revocation fine pursuant to section 1202.45, imposition of which will be stayed pending successful completion of parole.

III

DISPOSITION

We modify the sentence by imposing the mandatory parole revocation fine in the amount of $200, imposition of which is stayed pending successful completion of parole, pursuant to section 1202.45. The trial court is directed to amend the abstract of judgment and the February 20, 2009, minute order to show that defendant is ordered to pay a restitution fine in the amount of $200, and the $200 parole revocation fine as herein indicated. The trial court is also directed to amend the abstract of judgment and the February 20, 2009, minute order to delete the notation that defendant was sentenced pursuant to section 667, subdivision (e)(1). A copy of the corrected abstract of judgment shall be forwarded to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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RICHLI
J.

We concur:

RAMIREZ
P. J.

KING
J.